duties required of him when four frames were working simultaneously. The site engineer elaborated the duties to be performed by him which were accepted by the learned president as "very burdensome".

The most important aspect of the whole piling operation was the final measurement of the depth of penetration of the piles. There was a conflict of evidence as to whether the appellant attended to the measurements of the piles personally or whether he did so or delegated the work to somebody else or relied on the measurements given by accused No. (1). There is no evidence to show that the appellant took the measurements or was present when the measurements for pile Nos. D26/2, M22-1 and M26-1 were taken. But, on balance and having regard to the burdensome duties he has to perform, it is more likely that Thomas took the measurements of the different piles, including the three piles and the appellant used these figures supplied by Thomas for his records. The learned president made no specific finding as to whether the appellant took the measurements of the three piles or was present when the measurements were taken, but made a general finding as follows:

"What is in controversy is whether the accused in making such false statements did so knowingly with the intention to deceive. Clearly the prosecution greatly depends on circumstantial evidence to pin the guilt on the accused. Now what are the circumstantial evidence that is put forward before me. To begin with the accused is the sole representative of the Municipality. On him was placed the very burdensome duty of ensuring that the contract was properly performed and recording measurements of every pile driven appears to be the most important part of his duties. The *accused must be fully aware of this* as on the accuracy of such recordings payments are made to Gammons. He cannot now plead that this is humanly impossible."

With respect, these deductions were faulty because there could be more than one inference which could be reasonably drawn from the facts. It could be inferred that appellant must have known of the short-pilings or ought to have known of the short-pilings or that he was so grossly negligent as not to care whether the figures recorded were false or not. It is a well-known principal of law that, where there is more than one inference which could be drawn, the inference most favourable to the accused should be adopted.

For purposes of section 4(c) of the Prevention of Corruption Act, personal knowledge that the three piles (D26/2, M22-1 and M26-1) were short driven was an essential ingredient of the charge. In *London Computator, Ltd.* v. *Seymour*,[1] the appeal court was dealing with the Defence (General) Regulations which provided that —

"If, in furnishing any information ... any person makes any statement which he knows to be false in a material particular ... he shall be guilty of an offence..."

It was held that the word "knows" bears its ordinary meaning and is not to be construed as "ought to have known". In *Sinniah Sokkan* v. *Public Prosecutor*,[2] Gill J. (as he then was) was considering the meaning of "knowingly made a false statement" and he stated:

"Several grounds of appeal have been urged on behalf of the appellant against his conviction and sentence, but to my mind the main question to be considered is whether he knowingly made a false statement in relation to his date of birth with the intention of inducing the registration authority to grant him a Citizenship Certificate. In the case of *Public Prosecutor* v. *Ng Chong*[3] the Court of Criminal Appeal held that in a prosecution of any person under section 116 (1) of the Road Traffic Enactment, 1937, for 'making any statement which to his knowledge is false' for the purpose of obtaining the grant of any licence to him, it must not only be proved that the statement was false but also that it was consciously made and known to be false."

In the absence of any specific finding of the learned president of personal knowledge by the appellant that the statement which he gave was false, the conviction cannot stand and the appellant must be acquitted.

Consequently, since the learned president had passed sentence without recording a conviction, only the sentence imposed by the learned president will be quashed.

Appeal allowed.

Solicitors: *Edgar Joseph & Son.*

PUBLIC PROSECUTOR v. PEH CHOO KEY

[A.Cr.J. (Ong Hock Sim J.) October 9, 1969]

[Penang — Criminal Appeal No. 40 of 1969]

Road Traffic — Pirate taxi — Use of vehicle as public service vehicle without licence — Sentence — Forfeiture of vehicle — Discretion of magistrate — Magistrate unjustified in ordering release of vehicle — Duty of magistrate — Road Traffic Ordinance, 1958, s. 92 (1).

In this case the learned magistrate had convicted the respondent on his plea of guilty for using a motor vehicle as a pirate taxi and sentenced him to pay fines and to be disqualified for 12 months. The learned magistrate ordered the motor vehicle to be released to the respondent. The Public Prosecutor appealed against sentence.

Held: the learned magistrate in this case had failed to exercise his discretion in ordering the forfeiture or release of the vehicle in accordance with accepted principles but in the circumstances no order could be made on the appeal.

Cases referred to:-

(1) *Rex* v. *Ram Dayal* A.I.R. 1950 All. 134 at 137.

(2) *Chung Khiaw Bank Ltd.* v. *Public Prosecutor* [1968] 2 M.L.J. 196.

(3) *Public Prosecutor* v. *Chuah Khay Soon* [1967] 2 M.L.J. 110.

MAGISTRATE'S CRIMINAL APPEAL.

Abu Mansor bin Ali (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Ong Hock Sim J. (delivering oral judgment): The respondent had been charged on 3 charges in connection with operating a pirate taxi, namely:

(1) That you on 21.6.66 at about 8.25 a.m. at Perak Road, Penang, being the driver of Motor Car No. R.275, did use the said motor vehicle on a road as a public service vehicle without there being in force in respect of such motor vehicle a valid licence granted under Part V of the Road Traffic Ordinance, 1958 and that you have thereby committed an offence against sub-section 92 (1) of the said Ordinance, and punishable under the same sub-section.

(2) That you on the same date, time and place, did use the said motor vehicle on a road for a purpose not included in the licence in force, to wit, for the conveyance of persons for hire or reward, for which

purpose the fee chargeable in respect of the licence is higher than the fee chargeable in respect of the licence in force, and that you have thereby committed an offence against sub-section 22(2) of the Road Traffic Ordinance, 1958 and punishable under the same sub-section.

(3) That you on the same date, time and place, did use the said motor vehicle on a road without there being in force in respect of such user such a policy of insurance or such a security in respect of third party risks as complies with the requirements of Part IV of the Road Traffic Ordinance, 1958 and that you have thereby committed an offence against sub-section 74(1) of the said Ordinance, and punishable under sub-section 74(2) of the said Ordinance.

To these charges the respondent pleaded guilty and was convicted and sentenced on the first charge to a fine of $300 in default 3 weeks' imprisonment, on the second charge to a fine of $40 in default one week's imprisonment and on the third charge to a fine of $100 in default 2 weeks' imprisonment. He was disqualified for 12 months but the vehicle was ordered to be released to him. The learned deputy appeals against the order of release of the vehicle.

The proceedings in the lower court terminated on the 17th January, 1968 and notice of appeal was lodged on the 24th of January, 1968. The appeal was solely against sentence yet it took the learned magistrate a year and six months approximately to give his reasons for his sentence. One begins to doubt the sincerity of his conviction in regard to the sentence he imposed when he had to wait that length of time to set down his reasons in writing. Clearly he knew he had wilfully and deliberately made an order diametrically opposed to that which had been made by this court. Of this, I need only quote what was said in the case of *Rex* v. *Ram Dayal*:[1]

"A magistrate is bound to follow the a[u]thority of the High Court to which he is subordinate. Whe[n] [he], therefore, he is called upon to decide a question of law [b]ecomes his duty to ascertain whether any pronouncement [of] the High Court exists on the point. Omission to do [so] as much dereliction of duty as omission to refer to [pro]visions of the statute. The disregard of authority is, however, something still more objectionable. It amounts to an act of insubordination....

No authority is necessary for the proposition that a judicial precedent of a higher court does not cease to be binding upon subordinate courts merely because all the relevant reasons in support of or against the view taken by the higher court are not mentioned in the judgment or the actual decision is based upon a reason which does not appeal to the subordinate court..."

The learned magistrate has put up a 30 page judgment. I need only in view of the judgment of the Federal Court in *Chung Khiaw Bank Ltd.* v. *Public Prosecutor*[2] deal with the question whether there being a discretion in the court to order forfeiture or release, that discretion had been exercised in accordance with accepted principles. A large part of the judgment clearly showed the total lack of appreciation of his subordinate status when he quotes "The settled law in the matter of the authority of conflicting decisions of two courts of equal jurisdiction" and yet seeks to confer upon himself the power to decide whether to overrule or merely refuse to follow the decision of this court in *Public Prosecutor* v. *Chuah Khay Soon*,[3] as it is clear that over-ruling is an act of superior jurisdiction. (See Editorial Note on "The Theory of Precedent" in [1940] M.L.J. vi at p. viii).

I now propose therefore to examine how the court "having decided to adopt the authorities which held the view that the court had a discretion to forfeit or release the vehicle" may resolve whether or not to do so having regard to the plea of defence counsel. It is agreed that this order should only be made after careful consideration. I would quote from the judgment to show how the mind of the learned magistrate worked in resolving the problem of forfeiture or release. As he aptly quotes from section 517 of the Indian Criminal Procedure Code (*Sohoni*, 16th Edn.) at page 3286:

"This section invests the magistrate with a discretionary power and it is a rule of law that such power must be exercised judicially, i.e. according to sound principles of law and not in an arbitraty manner. But what that means is not that the order is in the opinion of the higher tribunal of revision an improper one which it would not have passed, but that, having regard to the materials before the court exercising, the discretion was exercised in a legal manner."

Then we come to the material point when he says:

"In deciding to exercise the discretion to forfeit or release in a case such as the present one it would be necessary for the court to consider carefully and anxiously (a) whether a punishment additional to the punishment of a fine is merited; and (b) whether the restoration of the vehicle to the accused (or other owner) is likely to result in enabling him to use it or allow it to be used for the continued commission of the offence under section 92(1).

In considering (a) above the ordinary principles applicable to sentencing would have to be considered, that is, that the sentence is one which serves the public interest, that is, provides a sufficient deterrent to the defendant and to others placed in similar circumstances as the defendant."

I would say that the concept of forfeiture being an additional punishment is somewhat novel. Punishment is provided by the legislature for offences and the machinery of justice is designed to punish offenders according to law and having regard to the public interest. Section 17 of the Criminal Procedure Code (Cap. 21) reads:

"17. When a person is convicted at one trial of any two or more distinct offences the court may sentence him for such offences to the several punishments prescribed therefor which such court is competent to inflict, such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court directs or to run concurrently if the court so directs,..."

The fact therefore that 3 charges have been framed against the respondent arising from the same act is immaterial. Forfeiture having also been provided in addition to any sentence passed is a clear indication of the seriousness with which the legislature views offences of this nature.

As I see from his grounds of judgment the order for forfeiture or release was made by this magistrate because he had arrogated to himself the power of pardoning offences. In this case the release of the vehicle was exercised out of his own whim and fancy. The failure of the magistrate to supervise his court by not requiring a bond to be signed when releasing the vehicle to the respondent while an appeal is pending against the order of release is a deliberate dereliction of duty and shows a conceited regard for his own views and opinion when he goes on to say "In considering whether

it served as a sufficient deterrent to the offender, no doubt, the most important consideration in the case of a pecuniary punishment is the means of the offender." The first charge was one for which in law the respondent could have been sentenced to a term of imprisonment not exceeding six months or a fine not exceeding $2,500 or to both such imprisonment and fine. On that view, therefore, the learned magistrate is trying to justify himself making an order which he knows to be manifestly incorrect and was not made in accordance with accepted principles governing the exercise of discretion. He said he was fully aware of the dangers posed to third parties by lack of insurance cover for pirate taxis. He seeks to justify his order for release by saying that the respondent will be punished under section 74(2) for an offence of operating a vehicle without third party insurance. For that offence the punishment could have been a term of imprisonment not exceeding three months or a fine not exceeding $1,000 or both. It can be seen therefore that the learned magistrate wholly disregarded the relevant factors to be considered in regard to the offence for which the respondent was charged. The court, he says, has to keep in mind in sentencing a lone and itinerant operator of a pirate taxi. He further says that the offence does not involve any degree of moral turpitude whatsoever, and the person who commits it is very often otherwise of industrious habits and good moral character concerned with the maintenance of his family. I do not know what the learned magistrate means by moral turpitude when such conduct on the part of the respondent could render a family destitute by taking away the breadwinner of the family and leave the dependants without any claim against the insurance company. I do not know how far he wished to stretch moral turpitude but it is disgraceful if people such as the respondent can be permitted to operate pirate taxis for personal gain without thought for members of the public and their passengers as also other users of the road who will not be covered as a result of injuries occasioned by him from the running of the pirate taxi.

Forfeiture, he said, must be regarded as being in the nature of a punishment and where the law gives the court a discretionary power to forfeit property it must be exercised with a great deal of care and regard must be had to various factors such as the maximum pecuniary punishment for the offence, the pecuniary punishment it is contemplated to impose, the value of the property liable for forfeiture and the deterrent effect of forfeiture.

I am unable to gather from his judgment which of these principles which he quotes from he had followed but it is quite clear that he thinks forfeiture is only a deterrent to the offender. When the law provides for forfeiture for offences of this nature the law seeks to deter the respondent and others like-minded from the type of offences, having regard to the fact that people carried in these taxis and people are not insured and are wholly unprotected by any form of insurance cover.

When the Federal Court itself in *Chung Khiaw Bank Ltd.* v. *Public Prosecutor*[2] said that the discretion has to be considered in terms of an innocent owner whose car was taken and used by the driver on some isolated occasion, e.g. as a result of theft and that the court might not, in such circumstances, decree forfeiture of the vehicle. The learned magistrate appeared to have failed to consider this aspect in deciding on his order for release. Having regard to the background of this case, I would say that this is a deliberate offence. It was not committed all of a sudden and on an isolated occasion but it was a course of conduct that had been pursued over a period of time. In no circumstances could it be considered that the learned magistrate was exercising his discretion according to accepted principles, and, as now stated by the respondent, he had already sold the vehicle. I would only repeat again that there is an obvious neglect of duty on the part of the learned magistrate in not ensuring that the release of the vehicle would only be made after the period of appeal had lapsed and when the notice of appeal had been lodged, he should see to it that the release would be upon a bond to produce the vehicle before the court in the event of his decision being reversed by the appellate court. To my mind, that neglect was wilful and deliberate, due to his conceited opinion of himself. In this case, it is now too late for me to order forfeiture.

The ground of appeal should have been purely on the question whether the learned magistrate in ordering the forfeiture or release of this vehicle had exercised the discretion in accordance with accepted principles. I have no hesitation despite his learned 30 page judgment to say that he has failed to do so. In the event, there will be no order on this appeal.

No order.

GOH YEW CHEW & ANOR. v. SOH KIAN TEE

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) October 31, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 31 of 1969]

Contract — Building contract — Impossibility of construction of building because of encroachment of neighbour's house into lot — Contract void ab initio — Claim for assessable expenses — Finding of fact by trial judge — Claim for forfeiture of deposit abandoned at trial — Appellant precluded from raising it on appeal.

In this case the appellant had undertaken to construct two buildings on land belonging to the respondent. The sum of $5,000 was paid by the respondent to the appellants as earnest money. It was found that owing to the encroachment of a neighbour's house into the lot it was not possible to construct the buildings according to the plans. In his action the respondent claimed the return of the sum of $5,000 as money paid for a consideration which had failed. The learned trial judge found that there had been no failure of consideration but that in the circumstances it was impossible *ab initio* to perform the contract. He held that the respondent was entitled to the balance of the deposit of $5,000 after deduction of all reasonable expenses incurred by the appellants. On appeal,

Held, dismissing the appeal: (1) as the appellants had at the trial abandoned their claim for a declaration that they were entitled to forfeit the deposit, they were precluded from raising the matter on appeal;

(2) in this case the court will not interfere with the learned trial judge's findings of fact as to what were the reasonable expenses incurred by the appellants.

Cases referred to:-

(1) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49, 50.